

## § 32.17 Obligation of Planning Board to Work With Applicant

Once authorized by the local legislative body, planning boards have the right to adopt and enforce a myriad of regulations. They have an obligation to use their best effort to ensure that development in the municipality will not have an adverse effect on the health, safety, and welfare of the community. Planning boards have every right to insist that all legitimate regulations are met<sup>122</sup> and, in fact, may not waive regulations if the public interest would be adversely affected.

Planning boards nonetheless have an obligation under the [New Hampshire Constitution](#)<sup>123</sup> to provide assistance to all citizens. The subdivision/site plan process is not a completely adversary process. The planning board has a duty to advise applicants and otherwise work with them as they attempt to negotiate the permit process.<sup>124</sup>

Planning boards must act reasonably in applying the statutory and municipal regulations to each application.<sup>125</sup> Planning board members and staff must be mindful of the expense incurred by developers in putting together proposals and must be careful not to make representations that may mislead a developer.<sup>126</sup> Boards should not be in the practice of granting preliminary approval arbitrarily on the grounds that they are free to reject a project for final approval at a later date or to change the standards that would be applied in the review process.<sup>127</sup>

The obligation of planning boards to provide assistance to citizens seeking approvals in the land use process creates a certain amount of tension with the obligation of planning board members to adhere to the "juror standard" when considering applications before them. The Supreme Court provided commonsense direction on this matter in [City of Dover v. Kimball](#).<sup>128</sup> The court specifically held:

Municipal officials must be free to advise applicants of whether their applications conform to statutory requirements and make suggestions on how to bring the applications into compliance. If an application does not conform and will not be accepted, the officials should be able to communicate this information without being accused of prejudging the application.<sup>129</sup>

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<sup>122</sup> [City of Dover v. Kimball](#), 136 N.H. 441, 616 A.2d 516 (1992) (because defendant's prior conduct violated statutory mandates, the board was well within its authority to rigorously require compliance with subdivision regulations).

<sup>123</sup> N.H. Const. pt I, art. 1.

<sup>124</sup> [Carbonneau v. Rye](#), 120 N.H. 96, 411 A.2d 1110 (1980) (landowner had been attempting to develop his land for four and one-half years; town counsel advised Supreme Court that town had not foreclosed possibility of issuing building permit if landowner came up with properly designed septic system, but that town was "not in the business of telling the plaintiff what to do so that he can get approval"; court stated that it is function of towns to provide assistance to their citizens under constitution and recommended that Rye "get in the business" of attempting to negotiate workable plan acceptable to both sides, [Carbonneau](#), 120 N.H. at 99, 411 A.2d at 1111).

<sup>125</sup> [Batakis v. Town of Belmont](#), 135 N.H. 595, 607 A.2d 956 (1992) (trial court found that planning board acted unreasonably when they granted preliminary approval for application as "site plan" and then denied final approval after applying subdivision standards; town planners repeatedly made assurances to plaintiff that his project would comply with applicable regulations, and based on those representations, plaintiff purchased property for \$290,000 and incurred other preliminary costs relating to project).

<sup>126</sup> [Batakis v. Town of Belmont](#), 135 N.H. 595, 607 A.2d 956 (1992).

<sup>127</sup> [Batakis v. Town of Belmont](#), 135 N.H. 595, 607 A.2d 956 (1992).

<sup>128</sup> 136 N.H. 441, 616 A.2d 516 (1992) (defendants illegally subdivided land and then illegally conveyed it to codefendants and became embroiled in lengthy litigation concerning boundaries with their codefendants and the city; eventually, defendants obtained subdivision approval for their conveyance; during course of subdivision process, one of parties to suit "pestered" long-time planning board member Harold Preston; always helpful and forthright Preston told landowners exactly why their application was insufficient and why he would have to vote against it; after subdivision was eventually approved, applicants alleged bad faith on part of Preston and sought damages from City of Dover; court found no bad faith and held that damages against municipality will only be allowed upon showing of bad faith).

<sup>129</sup> [City of Dover](#), 136 N.H. at 447, 616 A.2d at 519.

The Court also noted that a planning board member's discovery of obvious inconsistencies in submitted documents and a subsequent statement to an applicant explaining why the inconsistencies would preclude approval of the application does not show that the application has been prejudged.<sup>130</sup>

The conflict between the obligation of a municipality to provide assistance to its citizens and the obligation of a land use board to maintain a certain level of impartiality was addressed by the court in [Richmond Co. v. City of Concord](#).<sup>131</sup> After being denied site plan approval Richmond appealed, alleging that the board had failed to "share its concerns" during the public hearing process regarding Richmond's compliance with the city ordinance thereby depriving Richmond of the opportunity to address and remedy any problems. The Superior Court agreed with the plaintiff and reversed the planning board's decision,<sup>132</sup> however, the Supreme Court reversed the trial court pointing out that the situations in which the Court has required municipalities to assist applicants were distinguishable from the facts in this case. In the cases where the Court has articulated the obligation to work with developers, it has been concerned about preventing municipalities from ignoring applications or otherwise engaging in dilatory tactics in order to delay a project. Those cases did not involve a board's actions during the public hearing process in which the board is required to maintain a certain level of impartiality.<sup>133</sup> The Court found that there had been a full and fair discussion of all issues and the fact that the board did not comment on the suitability of the project prior to its deliberative session and vote, was neither inappropriate nor unusual since the purpose of the board's deliberative session is to decide the issues.<sup>134</sup>

The New Hampshire Supreme Court has consistently used reasonableness as a benchmark for assessing whether municipalities have fulfilled their constitutional obligation to provide assistance.<sup>135</sup> In the context of aiding property owners seeking municipal approval to develop their property, the Court's focus has been aimed at preventing municipalities from ignoring an application or otherwise engaging in dilatory tactics in order to delay a project.<sup>136</sup> The Court has not imposed upon zoning officials a constitutional duty to take the initiative to educate citizens about the pendency of a project in their neighborhood or about the permit and appeal process.<sup>137</sup>

*(From Loughlin, 15 New Hampshire Practice: Land Use Planning and Zoning, Ch. 32, Planning Board Procedures on Plats, §32.17 (LexisNexis Matthew Bender) (Fourth Edition)*

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<sup>130</sup> [City of Dover](#), 136 N.H. at 447, 616 A.2d at 519.

<sup>131</sup> 149 N.H. 312, 821 A.2d 1059 (2003).

<sup>132</sup> [Richmond Co. v. City of Concord](#), 149 N.H. at 313-14, 821 A.2d at 1060-61. (2003)

<sup>133</sup> [Richmond Co. v. City of Concord](#), 149 N.H. at 315, 821 A.2d at 1062. (2003)

<sup>134</sup> [Richmond Co. v. City of Concord](#), 149 N.H. at 316, 821 A.2d at 1062. (2003)

<sup>135</sup> [Kelsey v. Town of Hanover](#), 157 N.H. 632, 638, 956 A.2d 297, 302 (2008) (Court rejected petitioners' claim that New Hampshire law imposed a constitutional duty upon the zoning administrator to properly inform them about the status of zoning approvals on their abutters' property as well as the appeal process open to them).

<sup>136</sup> [Kelsey v. Town of Hanover](#), 157 N.H. 632, 638, 956 A.2d 297, 302 (2008).

<sup>137</sup> [Kelsey](#), 157 N.H. at 639-640, 956 A.2d at 303.